

A Discussion of the Politics of Power and Control in Migration Law: Perspectives from Australia and the United States

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Transnational, International and Comparative Law and Policy Network



Biennial Interdisciplinary Conference

“The Law and Politics of Control and Power”

26 – 27 May 2017, Bond University, Gold Coast, Australia

‘O, it is excellent

To have a giant’s strength, but it is tyrannous

To use it like a giant’

William Shakespeare, Measure for Measure, Act 2, Scene 2

‘Power lacks morals or principles. It has only interests’.

Horacio Castellanos Moya

Conference Program 2017

Co-Convenors of the Transnational, International and Comparative Law and Policy Network

Associate Professor Leon Wolff

Associate Professor Danielle Ireland-Piper

Conference coordinators:

Associate Professor Danielle Ireland-Piper

Assistant Professor Jodie O’Leary

Assistant Professor Elizabeth Greene

Day 1 - Friday 26 May 2017

Coffee and Registration	0900-0920	Jodie O'Leary and Elizabeth Greene.	
Official Welcome and Acknowledgment of Country	0930 - 0945	Assistant Professors Jodie O'Leary and Elizabeth Greene	Welcome on behalf of Conference Convenors
		Professor Nick James, Executive Dean, Faculty of Law.	Dean's Welcome
Opening Address	Time: 0945-0955	Associate Professor, Leon Wolff: Queensland University of Technology; and Associate Professor, Dr Danielle Ireland-Piper, Bond University.	Opening address by Co-Convenors of <i>Transnational, International and Comparative Law and Policy</i> (TICLP) Network.

SESSION 1 – KEYNOTE OPENING ADDRESS

Presenter/Speaker	Time	Title
Professor Kim Rubenstein, Australian National University	1000-1045	<i>Power, Control and Citizenship</i>

Bio: Professor Kim Rubenstein is a leading legal academic and practitioner. She is a graduate of the University of Melbourne and Harvard Law School. From 2006-2015 she was the Director of the Centre of International and Public law in the ANU College of Law and in 2012 she was appointed a Public Policy Fellow at the ANU. She was named in the first batch of Westpac '100 Women of Influence' and in October 2013 she was awarded an inaugural Australian Financial Review award for her work in public policy. In October 2013, she was awarded the inaugural Edna Ryan award for 'leading feminist changes in the public sphere'. Professor Rubenstein has appeared in three significant High Court constitutional law cases on citizenship, two as lead counsel and one as junior to the Solicitor General. Her present research involves two Australian Research Council grants including an oral history project on Trailblazing Women and the Law, with partners including the National Library of Australia, the National Foundation for Australian Women, the Federal Court of Australia, the Family Court of Australia and Australian Women Lawyers.

10.50 – 11.10 - MORNING TEA

SESSION 2: Power, Control & the Vulnerable

Presenter/Speaker	Time	Title
Assistant Professor Jackson Walkden-Brown, Bond University.	1115 -1130	<i>Power, Knowledge and Welfare in Australian Intensive Farm Animal Production</i>

Abstract: The systems of agriculture used in Australia to raise animals for slaughter and human consumption have undergone profound transformation in the past half-century. Traditional mixed agriculture systems that combined crops and multi-species animal production have largely given way to industrialised single-species intensive confinement systems in all of the significant livestock sectors. Proponents claim that intensive farming has led to improvements in productivity, nutrition and disease control, while opponents claim that intensive farming has a detrimental impact on human health, the

environment and, most notably, the wellbeing of animals being raised in such systems. This debate has long been characterised as a war between farmers and animal liberationists. One of the primary weapons of war utilised by contemporary animal liberationists in the battle over transparency has been the public release of covert surveillance footage captured in intensive farming facilities. In turn, government and industry condemnation of covert surveillance tactics has led to the birth of a new breed of legislation commonly referred to as ‘ag-gag’ laws. The term ‘ag-gag’ describes a variety of anti-whistleblower laws that seek to hinder animal liberationists by criminalising the capture and release of covert surveillance footage. Following the lead of a number of state legislatures in the United States, ag-gag bills have been recently introduced at both a state and federal level in Australia and politicians from both of the major political parties have voiced their support for the introduction of ag-gag legislation. Through application of Michel Foucault’s ideas about knowledge, power and discourse, this presentation will explore the ongoing battle of ideologies underlying the rise of ag-gag legislation in Australia. It is hoped that this methodology will contribute to the development of a theoretical context of the politics of truth about animals and encourage a deeper level of reflection on concept of farm animal welfare.

Dr Melissa Curley,
University of Queensland.

1135-1150

Extraterritorial jurisdiction, criminal law and transnational crime: insights from the application of Australia’s child sex tourism offences

**This paper is co-authored by Melissa Curley and Elizabeth Stanley*

Abstract: Scholars have noted an increased reliance on extraterritorial criminal jurisdiction as a response to transnational criminal activity, the rise in treaty law, and the resultant moral obligations. Meanwhile, existing international legal commentary notes that there are difficulties attached to using extraterritorial offences as the primary tool to deter and combat Child Sex Tourism (‘CST’). While extraterritorial offences are recognised as one (albeit important) part of a spectrum of legal and socio-political sanctions against CST, serious obstacles remain to their effective implementation. Scholars have identified the challenges involved in bringing charges related to extraterritorial CST offenses within the jurisdiction of the offender’s citizenship. Frederick Martens is an Australian citizen who was prosecuted under s 50BA of the Crimes Act 1914 (Cth), a provision inserted into the Act to prevent and punish CST. Martens’ experience exemplifies some of the common difficulties arising in prosecuting extraterritorial CST offences. He was convicted of having sex with a minor outside of Australia and sentenced to a term of imprisonment. It later emerged that there was additional evidence that cast significant doubt upon his guilt, and as a result of this fresh evidence, Martens was granted a pardon and released. The case serves as a warning regarding the difficulties of these trials and the dangers of ill-considered prosecutions. Concerns raised by the case are canvassed in the conclusion, including evidentiary concerns, issues inherent to relying on child witnesses, the time delay often involved in prosecuting CST offenders, fair trial concerns, and the problematic application of extraterritorial jurisdiction. This paper also addresses related controversies regarding sexual offences committed by UN Peacekeeping personnel. The paper therefore intersects with key themes of the conference in relation to the politics and power of prosecutorial discretion and extraterritorial offences, and their role in upholding human rights of vulnerable children.

Assistant Professor
Elizabeth Greene , Bond
University.

1155-1210

Domestic violence disclosure schemes: effective law reform or continued assertion of patriarchal power?

**This paper is co-authored by Rachael Field, Jodie O’Leary and Elizabeth Greene.*

Abstract: Domestic violence is currently under the spotlight in Australia. In Queensland, the focus on reducing the incidence of domestic violence has become paramount since the Taskforce on Domestic and Family Violence released the *Not Now, Not Ever* report. One of the most recent developments in Queensland is the Queensland Law Reform Commission’s Review about whether a domestic violence disclosure scheme (‘DVDS’) should be introduced in Queensland. A DVDS aims to provide potential victims of domestic violence (and sometimes others) with details of their partner’s/potential partners history of domestic violence. This arguably allows potential victims to make more informed decisions about the relationship moving forward. DVDSs exist in England and Wales, Scotland and New Zealand. However, as yet, given their short life span, there have not been comprehensive reviews as to the impact of such schemes upon victims and perpetrators. Further, although New South Wales is piloting a DVDS, a full evaluation as to the success or otherwise of the pilot is still forthcoming. As the empirical evidence about DVDSs is sparse, this paper considers analogous schemes targeting sex offenders (in Australia, the US and the UK), to better comprehend and evaluate the effectiveness of such schemes. The paper argues that, given the results related to sex offender registries, DVDSs will not be effective in reducing recidivism, nor will recipients of information be likely to take proactive action. Further, while victims of domestic abuse come from diverse backgrounds, and domestic violence encompasses various forms of relationships, the majority of victims are women, and most perpetrators are men. Similarly, most victims of sexual offences are women. This paper argues that the use of DVDSs, like sex offender registers, shifts the responsibility for avoiding such abuse onto the, largely female, recipients of the disclosed information, in a continued manifestation of the patriarchal power underpinning such violence.

Questions & Panel

1215-1235

Chaired by Professor Nick James, Executive Dean, Faculty of

12:40 – 13:40 - LUNCH

SESSION 3: Migration, Citizenship and Identity

<i>Presenter/Speaker</i>	<i>Time</i>	<i>Title</i>
Michael Krakat, PhD Candidate and Legal Practitioner, Bond University.	1345 -1400	'Cash-for-passports: Power-relations in the Law of new market citizens'
<p>Abstract: This paper discusses the recent phenomenon of direct sale of citizenship, the naturalization without residency requirement ('CBI'). This 'new citizenship' is characterized by individualization, hypermobility and flexibility, and because of its often quoted 'thinness,' it may at times lack international acceptance (see already <i>Nottebohm</i>, 1955 ICJ). This trend is nonetheless pointing toward the need for global upward mobility and the interconnectedness of global issues beyond markets. The paper firstly identifies an individual-mercantile approach to citizenship for sale, being an exceptional pathway in the basket of ordinary immigration venues. This pathway runs on the idea of admitting unique individuals as Olympians or as wealthy investors based on large 'donations' or the 'service to a nation' and at times, 'service to humanity'. Another approach to CBI is one being more uniform, referring to a set fee for citizenship, applicable to all migrants. While both approaches seem to allow for sovereign nations to put price-tags on citizenship and to perpetuate sovereign power over citizenship, they also allow for global markets to gaze back into the inner sanctum of the sovereign state and its laws of citizenship, evident in several CBI-nations having seen the urge to minimise or completely waive residency periods in a bid to increase their competitiveness. Are states now transforming from 'gatekeepers' to 'shopkeepers' losing control over the product of citizenship-of-convenience? The paper points at the 'gatekeepers' paradox' - referring to the self-erosion of sovereignty and control by the selling state. It also outlines a potential shift of choice and bargaining-powers toward the 'new citizens,' away from market states. In reverse, is it now also possible that one or several CBI-nations become dominant players on the global market for citizenship, setting standards for price and legal frameworks, imposing their citizenship models as blueprints for 'global citizenship?'</p>		
Lee-Anne Sackett, University of the South Pacific.	1405-1420	<i>Challenges for control and power over Rotuma</i> <i>*This paper is co-authored by Jason Titifanue, Lee-Anne Sackett and Romitesh Kant (USP)</i>
<p>Abstract: Rotuma, a group of small islands in the South Pacific with a unique indigenous people, was annexed to Great Britain in 1879 and ceded in 1881 incorporating Rotuma into the Fiji colony. Under the Fijian Constitution at independence, Rotuma and its people were distinguished from 'Fijians' and other ethnic groups. Subsidiary legislation protecting Rotuman culture, customs and land also provided for a higher degree of autonomy and self-governance comparative to other administrative areas within Fiji. These arrangements remained in place and constitutionally protected until the 1997 Constitution was abrogated. Under the 2013 'ethnically blank' Fijian constitution, Rotuman culture, customs and land are recognised in the Preamble, however, the only protections are found in exceptions to equality before the law in relation to land, marine resources and chiefly title. More recent developments have included two bills intending to replace the Rotuma Act and Rotuma Lands Act, which indicate a significant shift away from the self-governance arrangements towards increased state government control. Most significantly, under these bills Rotuma is redefined as 'the islands of Rotuma' in contrast to current definitions that infer Rotuma's status as a sovereign island and include Rotuma's vast maritime resources. In addition to this, Rotuma no longer has its own judicial system and the Council of Rotuma's role is reduced to <i>considering</i> matters affecting the Rotuman people. The Minister responsible for Rotuma also has discretionary powers over the use of Rotuman development funds, appointing Land Commission members and the establishment of appeal tribunals for land decisions. Furthermore, all Rotuman land dealings would become subject to other legislation affecting land ownership such as the State Acquisition of Lands Act, Forest Decree, Petroleum (Exploration and Exploitation) Act and Mining Act. This paper analyses the nature of the legal relationship between Rotuma and Fiji in light of these new developments and the political influences behind the shift towards greater state government control and power over Rotuman affairs and land.</p>		
Lindsey Stevenson-Graf, Bond University and Chantal McNaught, Lawyer.	1425-1440	<i>A Discussion of the Politics of Power and Control in Migration Law: Perspectives from Australia and the United States</i>

Abstract: Migration law has captured a key role on the international stage following the widely-reported telephone conversation between Australia's Prime Minister Malcolm Turnbull and US President Donald Trump. The conversation was prompted by President Trump's executive order to ban migration from seven middle-eastern states for 90 days, and halt total refugee migration for 120 days, with Syrian refugees facing an indefinite ban. This had an immediate impact on Australia, as prior to President Trump's election, Australia had struck a deal with the US to settle 1,250 assessed refugees currently held in its offshore detention centres on Nauru and Manus Island, Papua New Guinea. While the migration ban has been denounced as 'unprecedented' in the United States, Australia has a history of utilising the same power and control politics to develop its migration laws and policies – from the 2001 Tampa crisis, which resulted in then Prime Minister John Howard introducing the Pacific Solution, to Prime Minister Tony Abbott's revival of the same policy in September 2013. The politics of power and control in migration law surrounding maritime asylum seeker arrivals is materially similar – its purpose is to control the flow of refugees arriving at the nation's border. In Australia, the history of refugee treatment has been fraught with opposition. In seminal cases when the Government's policy has been found to be invalid by the Judiciary, the Government exploits power and control politics to sway the Legislature into amending the offending legislation. President Trump's criticism of the US Judiciary's decision to grant a temporary restraining order exhibits similar power and control politics currently playing out in the US. While the public denouncement of President Trump's political methods surrounding the migration ban gains notoriety, it is important to recognise the same power and control methods are used closer to home.

Questions & Panel
discussion

1445-1500

Chair: Assistant Professor Narelle Bedford

15:00 – 15:25 – AFTERNOON TEA

SESSION 4: Power, Control and the Socio-Legal

Presenter/Speaker

Time

Title

Associate Professor
Leon Wolff,
Queensland
University of
Technology

1530 –1545

Can Control be Cute? The Economics, Politics and Law of Japanese Cute Culture.

Abstract: *Kawaii* (or cute) culture is a defining feature of Japanese visual culture. From Hello Kitty characters and *Pokemon* games to Lolita-fashion and *anime*-like town mascots, Japan celebrates the child-like and the adorable. Cute culture, however, is more than just a quirky side to Japanese modern culture. Politically, it forms part of Japan's soft power strategy to maintain global influence. Economically, it is an important segment in both domestic and global markets. And legally, it is a device to convey information to citizens about their rights and duties. This presentation explores the different ways Japan uses cute culture to exercise economic, political and regulatory power.

Dr Angela Daly,
Queensland University of
Technology.

1550-1605

Private Power Online: how does EU law fare?

Abstract: The emergence of very large transnational private companies which provide critical Internet infrastructure and services has brought with it corresponding concerns about the power of these companies to control, surveil and otherwise influence our communications. Many of these companies also gather vast amounts of data by and about their users – a bank of data which has proved attractive to the public power of nation-states' security and law enforcement agencies, which have accessed it in less than transparent and legitimate ways, as Edward Snowden's revelations from 2013 attest. Against this backdrop, and adopting a socio-legal methodology, this presentation considers some key topics, such as net neutrality, the Commission investigations into Google and the emergence of cloud computing, and considers how well existing EU legal and regulatory frameworks are able to protect individual Internet users' interests vis-à-vis private power online. This presentation is based on my book, *Private Power, Online Information Flows and EU Law*, which has just been published by Hart.

Questions & Panel
discussion

1605-1620

Chair: Professor Dr Jonathan Crowe

17:15 – 19:00: TWILIGHT PLENARY PANEL AND COCKTAIL RECEPTION

Session 5: Interdisciplinary Perspectives in Power and Politics

Presenter/Speaker Time Title

Professor Jonathan Crowe Faculty of Law, Bond University.	1730 – 1750	<i>‘Three Illusions of Modern Politics’.</i>
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Abstract: Modern political discourse is characterised by three pervasive and harmful illusions: the illusions of control, desert and revenge. The *illusion of control* holds that we can effectively manage our social and economic environment in order to keep ourselves safe from harm. The *illusion of desert* holds that in a well governed society people generally get what they deserve. The *illusion of revenge* holds that we can create beneficial social outcomes by punishing those who transgress legal and social norms. I discuss the central role these illusions play in current political debates, drawing on work in social psychology to explain their persistent appeal. I explore why they are particularly prominent in modern, as opposed to premodern and postmodern, ways of thinking about law and politics. Finally, I try to imagine a radically new form of political discourse based on accepting that we are not in control, people don’t get what they deserve and coercion is not the answer.

Dr Sally Sargeant Faculty of Health Sciences and Medicine, Bond University.	1755 – 1815	<i>‘Conformity, Compliance and Control: Insights from Psychology’.</i>
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Abstract: History has taught us how cultural attitudes can decisively shift when societal norms and beliefs are reinforced or challenged. Laws change to reflect this and leave indelible marks in our shared social conscience. In alignment with the conference theme of the law and politics of power and control, this talk will offer insights from social psychology (at collective and individual levels), and how we can begin to understand the instigation and maintenance of control. Examples range from seminal experiments (and subsequent replications) in psychology, through to explaining nuances within language and discourse. Whether in exceptional circumstances or everyday interactions, this presentation asks whether the power of rhetoric alone is sufficient to exert power over others.

Dr Caitlin Byrne, School of International Relations, Faculty of Society and Design, Bond University .	1820 – 1840	<i>‘Contesting power: perspectives from international diplomacy’.</i>
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Abstract: Power—an ancient and ubiquitous concept—sits at the centre of global politics. It drives the behaviours and preferences of states, and thus their diplomacy. Traditionally understood in material terms, power in the international system has been typically viewed as a hard resource, wielded through the threat or use of force. Within this view, the role of diplomacy has been to manage the threat, and deter or mitigate the impact of force. In recent decades, notions of power have expanded. The concept of soft power proposed in the 1990s by Harvard professor Joseph Nye provided a timely counterpoint to the realist-driven hard power strategies that had come to dominate foreign policy discourse. Nye’s model of soft power trades in the ideational currencies of a nation’s values, policies, culture and institutions. It manifests itself through an actor’s ability to set agendas, attract others to a position or way of thinking, and influence their preferences (Nye 2004). It is both wielded and generated through diplomacy’s public dimension. Yet, in reality the distinctions between hard and soft power do not play out so neatly, and the binary between traditional and public diplomacy is increasingly blurred. This is particularly so in the dynamic Indo-Pacific. For this “super-region” hard and soft power are necessarily interlinked, while new patterns of social power developed through transnational networks continue to change the landscape. This paper explores these contesting notions of power to understand their impact on diplomatic practice, particularly within the region. The aim is to better understand the relationship between power and diplomacy, while also contributing complexity and nuance to contemporary diplomacy’s unfolding agenda.

19:15 - CONFERENCE DINNER FOR ALL REGISTERED CONFERENCE PARTICIPANTS

DAY 2 – Saturday 27 May 2017

Coffee and Registration

0945-1000

Session 6: Control and Power in Investment Regulation and Finance

Presenter/Speaker	Time	Title
Assistant Professor Dr Umair Ghori, Bond University.	1005 - 1020	<i>New Directions in Foreign Investment Dispute Resolution in Times of Remerging Protectionism</i>

Abstract: Developments in the realm of foreign investment laws exhibit an uncontrolled, multidirectional characteristic. The fact that disputes in foreign investment laws are resolved through ad hoc tribunals has resulted in confusion and inconsistencies. The conflict in resolution of investment disputes raises unique questions of power and control in the sphere of international trade and investment where the state struggles for power and control over investment assets with investors who may have acquired a semblance of title and interest in the subject of the investment. The question of 'fair and equitable treatment' and appropriate compensation underpins almost all regulatory aspects of foreign investment dispute settlement. Recently, an initiative by the EU aims to establish a new direction in resolution of foreign investment disputes by establishment of a world investment court. The EU has embarked upon this process by incorporating an investment court mechanism in its FTAs with Vietnam and Canada. This paper evaluates the existing alternatives that address different aspects of current challenges in foreign investment regulation e.g. efforts to negotiate a comprehensive treaty on foreign investment with global effect or in the alternative, a 'soft law' approach based on a model treaty which can be adapted to various situations, reforming Free Trade Agreements (FTAs) or Bilateral Investment Treaties (BITs) and the introduction of an appeal mechanism to cure one of the biggest criticisms of investment dispute settlement process. The paper also considers the current EU proposal on establishment of an investment court system and the prospect of allowing the WTO Dispute Settlement Body to adjudicate investment disputes.

Assistant Professor Louise Parsons, Bond University.	1025 - 1040	<i>Central banking in the era of cryptocurrencies and blockchains: law, power and control</i>
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Abstract: The increased mainstream adoption of cryptocurrencies and distributed ledger technology (blockchains) will also reshape the world of central banking. There is the potential for a nation state to lose power and control as a proliferation of cryptocurrencies, private consensus-based settlement mechanisms, and transactions outside the current financial system make a trusted central third party unnecessary. A central bank – the ultimate trusted third party for the issue of fiat currency, monetary policy, payment systems and financial stability – can choose to ban, tolerate or co-opt these innovative technologies. This paper will consider two extremes in potential outcomes, each with a different legal result based on the role of the state. One extreme outcome involves a complete loss of power and control through the disappearance of central banks and an advent of a new 'free banking' scenario, in which blockchains perform all central-banking functions. This was in fact the political goal of the creator(s) of Bitcoin in 2008. In this scenario, state control is effectively lost in favour of private a-national peer-to-peer networks of distributed consensus without the requirement of a trusted third party. At the other end of the spectrum is the exact opposite, through a permissioned, supranational, government-operated blockchain. This is a form of

‘cryptobanking’ involving state-sponsored or central bank-issued cryptocurrencies, direct banking by customers at the central bank and the regulation of transactions and participants by smart contracts. It amounts to total control for the central bank over money-creation through the disappearance of the current fractional reserve lending model. This scenario is one of total power and state control - a socialization of banking and finance. Both these scenarios present an intersection of the roles of law and politics that will ultimately determine where control and power will lie. Central banks are after all creatures of statute; state-denominated fiat currency and legal tender are legal constructs. Financial markets, institutions and customers are subject to extensive regulation. In the era of cryptocurrencies and blockchains the role of law will extend beyond regulation to the creation of new roles for central banks, and the delimitation of their power and control that will be reflective of that of the state.

Questions & Panel discussion	1045 - 1100	Chair: Professor Dr Vai lo Lo
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11: 00 – 11:20: MORNING TEA

SESSION 7: Courts and Foreign Power

“CONTROL AND POWER IN RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND INTERNATIONAL ARBITRAL AWARDS”

Presenter/Speaker	Time	Title
Justin Hogan-Doran, Barrister-at-Law, 7 Wentworth Selbourne Chambers; Adjunct Senior Lecturer, University of Sydney.	1125 - 1140	<i>Australian Enforcement of Foreign Judgments and Arbitral Awards</i>

Abstract: Mr. Hogan-Doran’s paper and presentation will address Australian approaches to registration and enforcement of foreign judgments on a reciprocal basis under the *Foreign Judgments Act* and at common law, and enforcement of awards in international commercial arbitration under the *International Arbitration Act* the legal and policy influences and factors for such reciprocal recognition, and consider the common law principles and processes in enforcement of foreign judgments that are not subject to the Act. The paper and presentation will also consider the commercial and practical implications in deciding where to sue an Australian defendant.

Ricky J. Lee, Partner, Globalex Tax & Legal, Adjunct Professor, University of Notre Dame Australia.	1145 - 1200	<i>Enforcement of Australian Money Judgments in Selected Overseas Jurisdictions</i>
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Abstract: Dr. Lee’s paper and presentation will address the recognition and enforcement of Australian monetary judgments in foreign courts, focusing principally on the different civil law and common law approaches in Canada, England, Germany, Switzerland, and the United States, with the benefit of a number of case studies. The paper and presentation will focus on the legal principles underlying such recognition, as well as their practical implications on prospective Australian litigants.

Dr Jeanne Huang, Senior Lecturer, University of New South Wales.	1205 - 1220	<i>Enforcement of Foreign Judgments and Arbitral Awards in Greater China and their Commercial Implications</i>
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Abstract: Mainland China has a dual system for recognition and enforcement of foreign judgments and so-called “sister-region judgments”. Dr. Huang’s paper and presentation will first address the recognition and enforcement of foreign monetary judgments in Mainland China by focusing on the reciprocity issue; and second, it will discuss how Mainland China recognises and enforces monetary judgments rendered by courts in Hong Kong, Macao, and Taiwan, being the so-called sister-region judgments.

Questions & Panel discussion	1225 - 1240	Chair: Assistant Professor Dr Umair Ghori
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12: 45 – 13:30: LUNCH

Session 8: The Efficacy of Law in Holding Power to Account

Presenter/Speaker	Time	Title
Associate Professor Danielle Ireland-Piper, Bond University.	1355 - 1410	<i>Controlling Government Power: Contemporary Triumphs and Failures of Courts</i>

Abstract: James Maddison, in *The Federalist Papers*, observed, ‘... the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself’. Taking up the theme of control, this paper considers recent decisions in constitutional courts that have demonstrated either a willingness or a reticence by the judiciary to limit government power. Specifically, it analyses: the decision of the High Court of Australia in *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, concerning Australia’s involvement in the detention of asylum seekers in the Nauru Regional Processing Centre; the decision of the Supreme Court of the *United Kingdom in R (on the application of Miller and another) v Secretary of State for Exiting the European Union*, on steps required to implement “Brexit”; and, finally, the decisions in *Washington v Trump* and *Hawaii v Trump*, which concerned United States Executive Order Executive Order 13769, titled, “Protecting the Nation From Foreign Terrorist Entry Into the United States” (commonly described as implementing a “travel ban” against a number of majority Muslim countries). These cases are explored with a view to determining whether there are common themes to be extracted in understanding the relationship between executive and legislative power and judicial scrutiny thereof.

Assistant Professor Narelle Bedford, Bond University.	1415 -1430	<i>The Winner Takes All: the impact of legal costs as a mechanism of control in public interest litigation against those without financial power</i>
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Abstract: Public interest litigation occurs when issues that transcend individual interests are brought to the courts. It can be an effective mechanism for controlling government power by achieving independent review of government decision-making in areas such as planning approval and environmental protection. Public interest litigation is an important mechanism for balancing the control exercised by the State. Once such matters have been determined by the courts, the issue of who should pay the legal costs of such proceedings arises. This is termed a costs order. Costs orders can be viewed as a tool of control over parties considering commencing public interest legal proceedings. For example, the fear of a court ordering an unsuccessful litigant to pay the costs of the successful party – which in most instances would be the government with all of its attendant resources – can act as a deterrent to even launching legal action in the first place. The potential party must not only be motivated to act to uphold the public interest but must also consider the financial implications of doing so. Any lack of financial power can therefore become a hurdle in the pursuit of access to justice and government accountability. To explore this example of control and power in practice a comparative perspective will be provided which will contrast the general approach to costs in public interest litigation in both the United Kingdom and Australia.

Senior Teaching Fellow Joseph Crowley, Bond University.	1355 – 1410	<i>Right of Return: The Chagossian People's legal battle to regain their island home</i>
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Abstract: In 1976 Britain signed a forty-year lease of its Indian Ocean island territory of Diego Garcia to the United States for the purposes of establishing a military base. The inhabitants, known as Chagossians, (originally African slaves bought to the island in the 1790’s to work in the coconut plantations) were forcibly removed. Since that time many legal challenges have been brought in both Britain and the United States on behalf of the Chagossians seeking a right of return. This paper explores this litigation; the causes of action, what they sort and why they have thus far been unsuccessful. This exercise of power by the Britain government over the Chagossians is, on its face, a breach of the Universal Declaration on Human Rights. Yet despite the dispossession of first nations people of their homeland, domestic courts in both Britain and the United States have declined to make adverse rulings against the actions of their respective governments. Further this paper explores the difficulty experienced by non-state actors in litigating through international organs such as the International Court of Justice or the International Court of Arbitration. Finally the paper posits that the rules of international law that provide standing to a party should be more broadly interpreted when dealing with non-state actors such as first nations people.

14:55 – 15:10: AFTERNOON TEA

Session 9: Student Research Conference Paper Competition Winners

Presenter/Speaker	Time	Title	Abstract
Madelaine Clifford	1515 – 1525	NON-STATE ARMED GROUPS: STATE CONTROLLED OR 'OUT OF CONTROL'?	The notion of control, in all its elusiveness, is a long-established mechanism for attributing the actions of non-state armed groups to intervening states. On one hand, legal 'control' can directly enliven state responsibility for the actions of a non-state armed group. On the other, such control may render a conflict between that group, and another state, 'internationalised' without having direct implications for state responsibility. In the latter context, such classifications can, however, have a direct bearing on individual criminal responsibility for war crimes. It is now uncontentious that positive state support, such as financing, equipping or training a non-state armed group, may represent a type of control sufficient to found this type of attribution. However, what remains highly contentious, is whether omissions or complete inaction on the part of a state, in relation to such groups, could satisfy these legal tests. Instinctively, it may seem absurd that the law of control could be invoked by a lack thereof. To the contrary, there is growing evidence, particularly in the wake of contemporary terrorist threats, that wilful blindness offers greater support than active control. Whilst lowering the standard of attribution to accommodate such realities would be problematic in the context of state responsibility, the same concerns do not arise in the context of individual criminal responsibility. Indeed, the International Court of Justice has recognised that different standards can apply 'without logical inconsistency'. Ultimately, this paper argues that state inaction, which facilitates non-state armed groups acting 'out of control', can be tantamount to a form of positive intervention for the purpose of (1) classifying a conflict as international, and (2) holding individuals accountable for war crimes that represent the gravest breaches of the Geneva Conventions.
Mikayla Brier-Mills	1530 – 1540	The principle of defensive democracy: using proportionality as a means of control	It has been several decades since proportionality was first introduced to the Western legal systems. During this period, no significant changes have occurred in its components or understanding as a constitutional tool, its applicability to Eastern legal systems, or its role in safeguarding the democratic character of both Western and Eastern states. It 'seems that the time is ripe... for a reexamination'. This paper analyses how democratic freedoms and values, inherent or emerging in the character of Eastern and Western states, can be defended by use of the proportionality approach known to the principle of defensive democracy. The principle is based on the notion that one must avoid the extreme, substantive and logical contradiction that would follow, from allowing those who disavow the existence of the state, to compete in the elections of that state. Moreover, the principle aims to control power before it is arbitrarily exercised. It measures the freedom of candidates to run for election against the need for states to disqualify those candidates (if they are suspected of ruling arbitrarily). A justified measurement requires balance... and balance requires proportionality. This paper focuses on the similarities and differences of how the concept of proportionality is used

Questions and panel discussion			as a means of control, in defensive democracies as compared to representative democracies. It will ultimately conclude that it is in the interests of Western states to introduce a 'defensive' aspect to their 'representative' democracies, which is equally in the interests of the East.
	1545 – 1600	Chair:	Assistant Professor Jodie O’Leary

Session 10: Closing remarks and Discussion of Future Research Directions

<i>Presenter/Speaker</i>	<i>Time</i>	<i>Title</i>
Associate Professor Leon Wolff	1600-1620	Closing Remarks: This short presentation will draw together the themes emerging throughout the conference to discern possibilities for a joint research project going forward.